

Jamal Md Yunos v Teresa Kok Suh Sim

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO W-02(IM)-188-02 OF 2020
SURAYA OTHMAN, HAS ZANAH MEHAT AND NANTHA
BALAN JJCA
27 NOVEMBER 2020

Civil Procedure — Striking out — Application to strike out action — Delay — Defendant applied to strike out action two years after filing defence and after suit was set down for trial on three occasions — Whether striking-out application had to be dismissed on ground of inordinate delay alone — Decision of Federal Court in Boo Are Ngor v Chua Mee Liang (sued as public officer of Kim Leng Tze Temple) [2009] 6 MLJ 145 — Whether plaintiff's defamation claim disclosed cause of action and raised questions fit for trial and was not plain and obvious one for striking out — Whether defendant's reliance on justification as defence showed he intended to prove truth of his defamatory remarks about plaintiff at trial

The respondent, a Member of Parliament, sued the appellant for defaming her by saying that she had misappropriated funds from a government-run foundation set up to help the needy. The defamatory remarks were made by the appellant in a statement given to the media after he had lodged a report over the matter with the Malaysian Anti-Corruption Commission ('MACC'). In his defence to the respondent's defamation suit, the appellant had pleaded justification, fair comment and qualified privilege. In her reply to the defence, the respondent pleaded malice on the appellant's part. The suit was set down for trial on three occasions. Almost two years after his defence was filed, the appellant applied to strike out the suit under O 18 r 19 of the Rules of Court 2012 and/or the inherent jurisdiction of the court. The High Court dismissed the application, holding that there was 'substantial and unreasonable delay' in making it. The court followed a decision of the Federal Court that such an application should be dismissed if it was filed after the action had been set down for trial. The High Court also found that the respondent's suit disclosed a cause of action and questions that were fit for trial (including the question whether the filing of the suit was premature, ie, before the MACC had completed its investigations) and that it was not a plain and obvious one for striking out. The instant appeal was against the High Court's verdict.

Held, unanimously dismissing the appeal and affirming the High Court's decision:

- (1) On the inordinate delay in the filing of the striking out application alone,

- A the appeal had to be dismissed. As held by the Federal Court in *Boo Are Ngor v Chua Mee Liang (sued as public officer of Kim Leng Tze Temple)* [2009] 6 MLJ 145, the court must dismiss an application for striking out if it was filed after the action had been set down for trial. In the present case, the striking-out application was filed well after pleadings had closed
- B (about two years after the defence was filed) and after the action was set down for trial on no less than three occasions. A party applying to strike out should not be indolent and must act with promptitude if he intended to move the court to strike out the action (see paras 9, 16–17 & 27).
- C (2) The discretion to strike out should only be exercised when it was demonstrated convincingly that the claim was on the face of it, obviously unsustainable. The court had to be satisfied that there was no reasonable cause of action or that the claim was scandalous, frivolous or vexatious or an abuse of process. If the pleadings disclosed some cause of action or
- D raised some questions which were fit to be tried, the mere fact that the case was weak or not likely to succeed was no ground for the pleadings to be struck out (see paras 19–20 & 28).
- E (3) The appellant's contention that the respondent's suit against him was 'premature' as the MACC had yet to complete its investigations into the appellant's report was not an issue that ought to be dealt with summarily particularly as the appellant had raised the defence of justification, which meant he intended to prove that the impugned statements he made about the respondent were true. Clearly, there were several factual matters and legal issues that had to be ventilated at trial. Even if the MACC did
- F institute criminal proceedings against the respondent, that in itself, plus the outcome of any such criminal proceedings, was irrelevant to the defamation action (see paras 22 & 25).

[Bahasa Malaysia summary]

- G Responden merupakan seorang ahli parlimen, menyaman perayu kerana telah memfitnahnya dengan mengatakan bahawa dia telah menyeleweng wang daripada satu Yayasan yang dikendalikan oleh kerajaan yang ditubuhkan untuk membantu mereka yang memerlukan. Pengataan fitnah dibuat oleh perayu dalam kenyataan yang diberikan kepada pihak media selepas dia telah
- H membuat satu laporan perkara tersebut kepada Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM'). Dalam pembelaannya, kepada saman fitnah responden, perayu telah memplidkan justifikasi, komen berpatutan dan perlindungan bersyarat. Dalam jawapannya kepada pembelaan, responden telah memplidkan niat jahat pada pihak perayu. Guaman tersebut ditetapkan
- I untuk perbicaraan pada tiga masa. Hampir dua tahun selepas pembelaan difailkan, perayu memohon untuk membatalkan guaman tersebut dibawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 dan/atau bidang kuasa sedia ada mahkamah. Mahkamah Tinggi telah menolak permohonan tersebut, dan memutuskan bahawa wujud penangguhan yang substantial dan tidak

munasabah dalam membuatnya. Mahkamah telah mengikuti keputusan Mahkamah Persekutuan bahawa satu permohonan sedemikian harus dibatalkan sekiranya difailkan selepas tindakan telah ditetapkan untuk perbicaraan. Mahkamah Tinggi juga mendapati bahawa guaman responden menunjukan satu kausa tindakan dan soalan yang harus dibicarakan (termasuk soalan sama ada pemfailan guaman tersebut adalah pra-matang, iaitu sebelum SPRM telah melengkapkan siasatannya dan ianya bukan satu kes yang biasa dan jelas untuk dibatalkan. Rayuan ini adalah berkenaan dengan keputusan Mahkamah Tinggi.

Diputuskan, sebulat suara menolak rayuan dan mengekalkan keputusan Mahkamah Tinggi.

- (1) Berkenaan dengan penangguhan pemfailan permohonan membatalkan sendiri, rayuan harus ditolak. Sepertimana diputuskan oleh Mahkamah Persekutuan dalam *Boo Are Ngor v Chua Mee Liang (sued as public officer of Kim Leng Tze Temple)* [2009] 6 MLJ 145, mahkamah harus menolak permohonan untuk membatalkan tindakan sekiranya ianya difailkan selepas tindakan telah ditetapkan untuk perbicaraan. Dalam kes ini, permohonan untuk membatalkan tindakan telah difailkan selepas pliding telah ditutup (lebih kurang dua tahun selepas pembelaan difailkan) dan selepas tindakan ditetapkan untuk perbicaraan dalam tiga tempoh masa. Pihak yang memohon untuk membatalkan tidak boleh berat tulang dan harus bertindak dengan segera sekiranya dia ingin untuk mengerakkan mahkamah untuk membatalkan tindakan (lihat perenggan 9, 16–17 & 27)
- (2) Budi bicara untuk membatalkan tindakan harus hanya digunakan apabila ianya telah ditunjukkan dengan jelas bahawa tuntutan tersebut pada asasnya tidak boleh diteruskan. Mahkamah harus berpuas hati bahawa tiada kausa tindakan munasabah atau tindakan tersebut adalah remeh dan menyusahkan atau satu penyalahgunaan proses. Sekiranya pliding menimbulkan kausa tindakan atau soalan yang perlu dibicarakan, fakta bahawa kes tersebut adalah lemah, atau tidak mungkin akan berjaya bukanlah satu alasan untuk pliding tersebut dibatalkan (lihat perenggan 19–20 & 28).
- (3) Hujahan perayu bahawa guaman responden terhadapnya adalah pra-matang kerana SPRM belum lagi melengkapkan siasatannya terhadap laporan perayu bukanlah satu isu yang perlu diputuskan secara ringkas terutamanya selepas perayu membangkitkan pembelaan justifikasi, yang bermaksud dia berniat untuk membuktikan bahawa pengataan yang dicabar yang dia buat terhadap responden adalah benar. Adalah jelas bahawa terdapat beberapa perkara fakta dan isu perundangan yang perlu dibicarakan. Jikalau sekalipun SPRM memulakan prosiding jenayah terhadap responden, ianya dengan

- A sendiri, dan juga apa-apa keputusan prosiding jenayah adalah tidak relevan kepada tindakan fitnah tersebut (lihat perenggan 22 & 25).]

Cases referred to

- B *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (folld)
Boo Are Ngor v Chua Mee Liang (sued as public officer of Kim Leng Tze Temple) [2009] 6 MLJ 145; [2009] 6 CLJ 617; [2010] 3 AMR 765, FC (folld)
Datuk S Nallakaruppan & Ors v Datuk Seri Anwar bin Ibrahim & other appeals [2015] 4 MLJ 34; [2015] 6 CLJ 425, CA (refd)
C *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1, FC (folld)

Legislation referred to

- D Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d)

Appeal from: Civil Appeal No WA-23CY-15-04 of 2017 (High Court, Kuala Lumpur)

- E *Mugunthan a/l Vadiveloo (Mohamad Fauzi bin Abdul Samad with him) (The Law Chambers of Fauzi & Nasser) for the appellant.*
Sankara Nair (Tan Han Sam and Elyse Ng with him) (SN Nair & Partners) for the respondent.

F **Nantha Balan JCA (delivering judgment of the court):**

- [1] This is the defendant's appeal against the decision of the learned judicial commissioner ('the JC') dated 3 January 2020 dismissing the defendant's application under O 18 r 19(1)(a), (1)(b), (1)(c) and 1(d) of the Rules of Court 2012 and also under the inherent jurisdiction of the court, to strike out the amended writ of summons and statement of claim dated 27 April 2017. We heard the appeal on 27 November 2020 and dismissed it. These are the reasons for our decision to dismiss the appeal. For convenience, we shall refer to the appellant and respondent as 'defendant' and 'plaintiff' respectively.

- H [2] The plaintiff was at all material times the Member of Parliament for the Federal constituency of Seputeh in Wilayah Persekutuan Kuala Lumpur. At a press conference held on 8 March 2017, the defendant gave a press statement and made remarks which cast serious imputations on the plaintiff's character and integrity. Essentially, the defendant had said that the plaintiff had misappropriated funds belonging to the Yayasan Warisan Anak Selangor ('YAWAS').
- I

[3] YAWAS is an agency established by the Selangor State Government to

undertake and implement welfare projects including the 'Skim Mesra Usia Emas' ('SMUE'). Under the SMUE, the families of deceased citizens of the State of Selangor will receive a sum of RM2,500 in two tranches. The defendant had clearly suggested that the plaintiff was involved in defalcations on monies belonging to SMUE.

A

B

[4] The defendant's remarks were published on various social media. Before making the remarks at the press conference, the defendant had lodged a report over the matter with the Malaysian Anti-Corruption Commission or Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM').

C

[5] The plaintiff filed the writ on 5 April 2017 against the defendant in respect of various alleged defamatory remarks which he had made at the press conference. The defendant filed the memorandum of appearance on 22 May 2017. The defence was filed on 23 June 2017. In his defence, the defendant pleaded justification, fair comment and qualified privilege.

D

[6] In terms of the plea of justification, the defendant contended as follows:

PEMBELAAN JUSTIFIKASI

E

4. Keterangan Defendan adalah bertujuan bagi mendedahkan salah laku juga penyelewangan wang rakyat Selangor dari dana Yayasan Warisan Anak Selangor (YAWAS) melalui Skim Mesra Usia Emas (SMUE) yang dilakukan oleh Plaintiff.

5. Merujuk kepada keseluruhan Perenggan 5 Pernyataan Tuntutan Terpinda Plaintiff, oleh yang demikian Defendan menafikan bahawa keterangan pada sidang media tersebut mengandungi kenyataan-kenyataan memfitnah Plaintiff. Defendan akan mengemukakan bukti-bukti berdokumen semasa perbicaraan kelak atas salah laku juga penyelewangan wang rakyat Selangor dari dana Yayasan Warisan Anak Selangor (YAWAS) melalui Skim Mesra Usia Emas (SMUE) yang dilakukan oleh Plaintiff.

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6. Untuk mengilustrasikan keadaan yang berlaku, berikut adalah fakta-fakta penting yang mengambil tempat atas tindakan Plaintiff yang boleh dibuktikan kelak semasa perbicaraan antaranya:

6.1 Yayasan Warisan Anak Selangor (YAWAS) merupakan syarikat yang ditubuhkan bawah inisiatif Peduli Rakyat oleh Kerajaan Negeri Selangor Darul Ehsan. Salah satu produk kendalian Yayasan Warisan Anak Selangor (YAWAS) adalah Skim Mesra Usia Emas (SMUE) yang mana ia merupakan satu skim khairat kematian.

H

6.2 Apabila warga negeri Selangor Darul Ehsan meninggal dunia, waris boleh menuntut dari Pusat Khidmat Dewan Undangan Negeri dan akan dibayar sebanyak RM2500.00 sebagai sumbangan khairat kematian melalui dua kaedah pembayaran. Pertama RM1000.00 dibayar serta-merta oleh Pusat Khidmat Dewan Undangan Negeri apabila berlaku kematian dan baki RM1500.00

I

- A dibayar oleh Pejabat Daerah & Tanah setelah sijil mati dikemukakan untuk tujuan proses pembayaran.
- B 6.3 Wang yang dibayar oleh Pusat Khidmat Dewan Undangan Negeri adalah melalui kad ATM Ambak Berhad dan dalam kes ini atas nama Plaintiff yang mempunyai had pengeluaran RM5000.00 sehari dan hanya boleh dikeluarkan jika berlaku kematian.
- C 6.4 Dalam kes Plaintiff, duit ini pula telah dikeluarkan lebih dari amaun yang sepatutnya serta tidak selari dengan data kematian.
- D 6.5 Sebahagian bayaran yang gagal diserahkan kepada penerima untuk satu tempoh yang agak panjang serta tiada penjelasan konkrit akan perkara yang berlaku walhal tuntutan untuk memproses wang yang perlu diberikan kepada penerima telah direkodkan selesai.
- E 6.6 Selain itu peruntukan wang ini tidak sepatutnya diuruskan oleh Plaintiff kerana beliau adalah Ahli Parlimen dari Negeri Wilayah Persekutuan Kuala Lumpur dan bukannya Ahli Parlimen mahupun Dewan Undangan Negeri dari Negeri Selangor Darul Ehsan sedangkan wang ini adalah hak bagi rakyat Negeri Selangor.
- F 6.7 Tambahan lagi setelah pendedahan ini dibuat oleh Defendan, Pengurus Besar Yayasan Warisan Anak Selangor (YAWAS) iaitu Encik Kamsani Bin Nasir telah digantikan kerana beliau seorang yang mufis namun menguruskan dana sebanyak RM 500 juta setahun.
- G [7] In her reply to defence, the plaintiff pleaded malice on the part of the defendant. The suit was case managed and set down for trial on three occasions. The application to strike out was filed on 25 April 2019 which is almost two years after the defence was filed.
- H [8] The JC dismissed the defendant's application to strike out the suit as he found that there was 'substantial and unreasonable delay in making the application'. The JC followed the Federal Court's decision in *Boo Are Ngor v Chua Mee Liang (sued as public officer of Kim Leng Tze Temple)* [2009] 6 MLJ 145 at p 150; [2009] 6 CLJ 617 at p 624; [2010] 3 AMR 765 at p 771 which stated that the court must dismiss the application for striking out if it is filed after the action has been set down for trial.
- I [9] In the present case, the defendant's application to strike out was filed well after pleadings had closed and *after the action had been set down for trial, on no less than three occasions*. As for merits, the JC's findings are as follows. The alleged defamatory remarks were made at a press conference on 8 March 2017, after the defendant had lodged a report with SPRM on 16 February 2017.
- [10] In response to the defendant's query, by a letter dated 8 August 2019 SPRM had stated that investigations against the plaintiff regarding alleged

misappropriation of YAWAS' funds was still ongoing.

A

[11] On that premise, defendant contends that the plaintiff's action is premature and that a cause of action did not exist. Further the defendant contends that the plaintiff ought to await the outcome of SPRM's investigation before initiating this action.

B

[12] According to the JC, the plaintiff's suit does disclose some cause of action or raise some questions fit to be decided by the court. Specifically on the issue whether the suit is premature the JC opined that it is a matter that should be determined at trial. The JC opined that it cannot be a ground for striking out the action at this stage.

C

[13] The JC also alluded to the defendant's argument that in lodging a report with SPRM, he acted in good faith to expose alleged illegal conduct in the management of YAWAS' funds and that he is protected by law in doing so.

D

[14] The JC took the view that the defendant's act of lodging of a report with SPRM is not the basis of the plaintiff's action and that the suit is in fact predicated on the alleged defamatory remarks made by the defendant at a press conference, subsequent upon lodgement of the SPRM report.

E

[15] The JC was thus not satisfied that there is no reasonable cause of action or that the plaintiff's claim is obviously unsustainable or frivolous or vexatious.

F

OUR DECISION

[16] The first issue is delay. No doubt a striking out application can be filed at any time. But that does not mean that the defendant can take his time and file the application to strike out after the action has been set down for trial. Quite apart from anything else, it is plain common sense that the defendant cannot be indolent. He must act with promptitude if he intends to move the court to strike out the action. As enunciated by the Federal Court in *Boo Are Ngor*, the court must dismiss the striking out if it is filed after the action has been set down for trial.

G

H

[17] Thus on the inordinate delay alone the appeal fails.

[18] At any rate, leaving aside the issue of delay, even if we are to consider the application on its merits, the defendant nevertheless, has the burden of establishing that this a plain and obvious case for striking out.

I

- A [19] Thus, the discretion to strike out is only to be exercised when it is demonstrated convincingly that the claim is on the face of it, obviously unsustainable. The court must be satisfied that there is no reasonable cause of action or that the claim is frivolous or vexatious.
- B [20] At this stage, the court is not concerned with the respective strengths and merits of the claims. If the pleadings disclose some cause of action or raise some questions which are fit to be decided by the judge, then the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 (SC)).
- C
- D [21] Clearly, the plaintiff's defamation suit is based on the impugned statements which were uttered by the defendant at the press conference which was held on 8 March 2017. The suit is not predicated on the fact that the defendant had lodged a report with SPRM.
- E [22] In our view, the defendant's contention that the suit is 'premature' is not an issue which ought to be dealt with summarily and this is particularly so because the defendant had raised the defence of justification, which means that he intends to prove that the impugned statements of and concerning the plaintiff's reputation and character, are true. Clearly, there are several factual matters and legal issues which have to be ventilated at trial.
- F [23] During submissions before us, counsel for the defendant said that if the defamation suit proceeds to trial, then this will 'supplant' the SPRM's investigations. We do not see how the defamation suit can be said to supplant the SPRM's investigations. Since the defendant has pleaded justification as a defence, he has to adduce all such evidence to establish the truth of the
- G impugned statements.
- H [24] This may well be the same evidence that the SPRM may eventually rely upon in the event the SPRM decides to file criminal proceedings against the plaintiff.
- I [25] In our view, if SPRM does institute criminal proceedings against the plaintiff, then that in itself plus the outcome of any such criminal proceedings will be irrelevant to the defamation action (see *Datuk S Nallakaruppan & Ors v Datuk Seri Anwar bin Ibrahim & other appeals* [2015] 4 MLJ 34; [2015] 6 CLJ 425, CA (paras 28 and 30))
- [26] Having heard the submissions of counsel, we feel compelled to refer to the case of *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1 where the Federal Court,

per Ramly Ali FCJ restated the principles on striking out as follows:

A

[27] The Court of Appeal, in *Sivarasa Rasiiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473; [2012] 1 CLJ 75, had adopted the well-settled principle of striking out in the following passage:

A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking *viva voce* evidence during trial (see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565; [1997] 3 CLJ 305 (FC)).

B

[28] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously' ie, the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail.

C

If one has to go into lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.

D

[27] Based on the principles that were enunciated by the Federal Court in *Boo Are Ngor* we are satisfied that the defendant's application to strike out (filed about two years after the defence was filed) was doomed to fail as it was filed after the action was set down for trial.

E

[28] In any event, even on merits, it is our view that based on the principles that were enunciated in *Bandar Builders* and *Seruan Gemilang*, the plaintiff's case cannot be said to be obviously unsustainable or that it discloses no reasonable cause of action, or that it is scandalous, vexatious or frivolous or an abuse of process.

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[29] In the circumstances, we do not find any appealable error on the part of the JC, such that it warrants appellate intervention. The defendant's appeal is dismissed. The decision of the JC dated 3 January 2020 is affirmed. The defendant is to pay costs of RM7,000 to the plaintiff (subject to allocator).

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Appeal dismissed and High Court's decision affirmed.

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Reported by Izzat Fauzan

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